



1 THE COURT: Let's go to Mr. Kelly. Okay. This is  
2 Leslie R. Kelly versus Marty Sapko, et al., Civil No. 03-368  
3 Erie.

4 Mr. Kelly, your motion is almost identical  
5 word for word as Mr. Siggers'. Is that not correct?

6 MR. KELLY: Yes, ma'am.

7 THE COURT: Tell me about what happened to you.

8 MR. KELLY: I had received a letter from your  
9 chambers, and it was opened. It had Leslie Kelly, Pro se,  
10 on it. It has Clerk, United States District Court; from  
11 your chambers.

12 Then I had another letter from the Bar  
13 Association. It didn't have no name on it.

14 They had no right to go in it. But it had  
15 "client". Client: Leslie Kelly on there.

16 THE COURT: All right. And those were both opened  
17 outside your presence?

18 MR. KELLY: Yes, ma'am.

19 THE COURT: Have you had any legal mail opened in  
20 your presence?

21 MR. KELLY: Yes.

22 THE COURT: Okay. And both of those pieces that  
23 you describe were pertaining to this case?

24 MR. KELLY: Yes, ma'am.

25 THE COURT: Ms. Horikawa?

1 MS. HORIKAWA: Okay. I have copies of two  
2 envelopes in front of me. One is from the Pennsylvania Bar  
3 Association. I don't see any indicia that says "client" or  
4 from any particular person from the Pennsylvania Bar  
5 Association. And I don't see any marking that it should be  
6 opened only in the presence of the inmate.

7 I don't know; maybe -- I just don't have it  
8 on my copy. I don't know if Mr. Kelly has something else in  
9 front of him that I don't have.

10 THE COURT: Mr. Kelly, does it say "client" on the  
11 letter or on the envelope?

12 MR. KELLY: On the letter. Says, Client: Leslie  
13 Kelly. Leslie R. Kelly.

14 THE COURT: And was this correspondence between  
15 your attorney and yourself?

16 MR. KELLY: Yes. This is from a -- a lawyer  
17 had -- my people had hired for me, but he was writing me  
18 back to let me know -- letting me know to call them at a  
19 certain time so we can arrange -- so we can make some  
20 arrangements.

21 MS. HORIKAWA: I don't have that. I never  
22 received a copy of that one. I have no idea. Without  
23 looking -- without seeing the envelope --

24 THE COURT: I understand. What about the other  
25 one? The other one is forms again?

1 MR. KELLY: The other one is a receipt for my  
2 filing fees.

3 MS. HORIKAWA: It just says Clerk's Office, United  
4 States District Court, Erie, Pennsylvania, addressed to  
5 Inmate Kelly. But, again, there's no individual from the  
6 Clerk's Office identified, and it's not marked to open only  
7 in the presence of the inmate.

8 MR. KELLY: It says "Pro Se" right after my name.

9 MS. HORIKAWA: It does say "Pro Se". That doesn't  
10 necessarily mean it was legal mail.

11 THE COURT: In fact, if it was a receipt, it was  
12 not legal mail.

13 Mr. Kelly, I'm not certain about the one --  
14 the one that you say is from your attorney would likely be  
15 legal mail. But, once again, as you heard me say, one  
16 instance does not a violation of your Constitutional rights  
17 under the Freedom of Speech and under the First Amendment  
18 make. And it's infringed, according to the case law, by a  
19 pattern and practice of opening incoming legal mail outside  
20 of your presence.

21 The fact that you have had others, you just  
22 told me that you had others that were, in fact, opened in  
23 your presence --

24 MR. KELLY: Yes, ma'am, but I had one before that  
25 my lawyer sent me, but he was just letting me know that he

1 couldn't take the case. But it wasn't opened in my presence  
2 either, as well. But I had -- I had tore it up. So I just  
3 tore it up --

4 THE COURT: So we really only have one to discuss  
5 here.

6 MR. KELLY: Right. Okay.

7 THE COURT: I am going to have to rule in the  
8 similar manner; that a motion for something as extraordinary  
9 as an injunction order should be denied, and I will put that  
10 on the record in a second. But as I said, the Constitution  
11 requires that FCI McKean be diligent in this regard.

12 Now, I think they will be extra diligent in  
13 this regard because of both of your complaints. But they  
14 are looking for the markings on the envelope. And you  
15 should tell your -- your attorney to -- and they usually do  
16 write "legal mail" on it. If -- especially if it contains  
17 something that -- that is private and confidential with you.  
18 All right?

19 MR. KELLY: All right.

20 THE COURT: So I'm going to make a report and  
21 recommendation that Mr. Kelly's motion be denied. I will  
22 cite the case of Clean Ocean Action versus York, 57 F.3 328,  
23 331 (Third Circuit), 1995 for the proposition that the four  
24 requirements for the extraordinary remedy of injunctive  
25 relief have not been met.

1                   And those requirements are the likelihood of  
2 success on the merits. And that mainly is because the --  
3 the Plaintiff is only complaining about one letter, and that  
4 does not show a pattern and practice. He also has agreed  
5 that he has received other legal mail that was, in fact,  
6 opened in his presence.

7                   To the extent of the irreparable injury from  
8 the alleged misconduct, his testimony is that the letter was  
9 from his counsel regarding when he was supposed to contact  
10 him, and there does not appear to be any irreparable injury  
11 from the fact that that was opened outside of his presence.

12                  Number three, the extent of harm to the  
13 movant, as said before, is minimal, and the effect on the  
14 public interest by this one letter is slight.

15                  I also want to point out that the factors for  
16 an issuance of a temporary restraining order are similar to  
17 those as -- similar to those required to issue a preliminary  
18 injunction.

19                  I want you to also understand, Mr. Kelly,  
20 that you have 10 days to object to my report and  
21 recommendation. You file those objections as you would a  
22 brief in opposition or however you wish to object to what I  
23 just stated in written form, and you send those to me -- to  
24 the Court, and those will be reviewed by Judge McLaughlin  
25 before a final order is issued. All right?

1 MR. KELLY: Okay.

2 THE COURT: Anything else from either Plaintiff?

3 MR. COLVILLE: Not from me, Your Honor.

4 MR. SIGGERS: Your Honor, Judge Baxter -- to my  
5 knowledge, I was trying to -- I was listening. Is your  
6 Clerk of Court on the phone now?

7 THE COURT: No, the Clerk of Court is in a  
8 separate office. They are an administrative office of the  
9 court system. And though I called the two people in here my  
10 law clerks, they are attorneys that work for me as a Judge.  
11 The Clerk of Courts doesn't work for the Judge, they work  
12 for the court system. And they handle administrative items  
13 like the forms and those sorts of things. They docket the  
14 cases. My chambers issues orders and receives courtesy  
15 copies of your filings. But other than that, your filings  
16 and such go to -- go to the Clerk's Office and are placed  
17 inside a file of your case.

18 MR. SIGGERS: I just sent the letter asking -- to  
19 your chambers or your Clerk of Court, asking questions --  
20 just like this sensitive matter that we're dealing with  
21 today. I was wondering how -- we have exhibits and things  
22 to that nature. This is my first time ever being --

23 THE COURT: You say you wanted to show these  
24 envelopes?

25 MR. SIGGERS: Excuse me?

1           THE COURT: You had these letters that you want to  
2 produce as exhibits?

3           MR. SIGGERS: On the civil action.

4           THE COURT: Oh, for the actual civil action. You  
5 have things that you want to show as evidence?

6           MR. SIGGERS: Yes, ma'am.

7           THE COURT: First of all, your case, in fact, has  
8 not been served yet. We have to wait for the money to come  
9 in. This is -- this is administrative stuff. The Clerk of  
10 Courts has to wait for the money to come in.

11           Now, you have authorized it -- I see you  
12 authorized it in the middle of December.

13           MR. SIGGERS: Nothing was taken -- I haven't  
14 received no clarification that you received the form or  
15 nothing.

16           THE COURT: I did. This has been docketed. We  
17 received the forms. What happens is they have to check your  
18 account every month to see if you have the \$32.25 to send in  
19 to get the case served. If it takes way too many months, we  
20 will listen to a motion from you to have it served anyway.  
21 But we are waiting for that initial filing fee, and then it  
22 will be served, and then it will be responded to by the  
23 Defendants.

24           Right now they don't even know they have a  
25 case to them. All right?



1 MR. SIGGERS: So can I send --

2 THE COURT: Let me just say, the rest of the  
3 citizens in the country have to pay \$150 before they are  
4 heard. Prisoners have a break. You don't have to prepay  
5 the \$150. You're allowed to pay it in installments. But we  
6 require that we get an installment first. That's what that  
7 is about.

8 MR. KELLY: I have sent mine in already --

9 THE COURT: That's right. Mr. Kelly, I think  
10 yours has been -- has his been served? I think -- the  
11 service has started. We received the first payment. So  
12 that means the service process will be started. You're a  
13 little bit ahead of Mr. Siggers there.

14 MR. SIGGERS: This is Mr. Siggers. Do I send a  
15 Form 24 and mail the money out myself --

16 THE COURT: No, no, no. You sent me the  
17 authorization form. That's up to the accounting office of  
18 your institution to forward to us the \$32.25 when you have  
19 it in your account.

20 THE WITNESS: Okay.

21 THE COURT: If you want them to move on it, you  
22 can send a note and say.

23 MR. SIGGERS: Can I just send the money out of my  
24 account for the whole thing?

25 THE COURT: The whole \$150 some?

1 MR. SIGGERS: Yes, ma'am.

2 THE COURT: The Courts, as with anyone else, would  
3 not turn it down. And we'll get it moving.

4 THE COURT: Anything else, Miss Horikawa or  
5 Mr. Colville?

6 MS. HORIKAWA: No.

7 MR. COLVILLE: No, Your Honor.

8 THE COURT: Thank you for arranging the call so  
9 that we could take care of these matters. And both  
10 Mr. Siggers and Mr. Kelly are going to be extra diligent in  
11 making sure their mail has been properly opened. So I'm  
12 sure, Miss Horikawa, that you will pass that on to the  
13 follows there.

14 MS. HORIKAWA: Yes, I will.

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16 (Hearing concluded at 2:38 p.m.)

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